

APPEAL NO. 031385
FILED JULY 16, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on April 29, 2003. The hearing officer determined that (1) the appellant (claimant) waived the right to bring forward an issue of carrier waiver under Section 409.021 by failing to raise the issue during prior proceedings at the Texas Workers' Compensation Commission (Commission); (2) the Commission does not have jurisdiction to consider the issue of carrier waiver because the claimant waived that issue; and (3) the issue of carrier waiver is moot. The claimant appeals these determinations, essentially asserting that she did not waive the right to bring forward an issue of carrier waiver because Downs v. Continental Casualty Company, 81 S.W.3d 803 (Tex. 2002) had not been finally adjudicated at the time of the prior CCH and the Commission has jurisdiction to consider the issue because the decision in the prior proceeding is under judicial review and has not become final. The respondent (carrier) urges affirmance.

DECISION

Affirmed.

On November 9, 1998, a hearing was held with regard to this claim to determine: (1) whether the claimant sustained a compensable injury in the form of an occupational disease; (2) the date the claimant knew or should have known that the alleged injury may be work-related, pursuant to Section 408.007; (3) whether the claimant timely reported an injury to her employer pursuant to Section 409.001; (4) whether the claimant had disability; and (5) whether the carrier specifically contested compensability on the basis of sole cause. The hearing officer determined that (1) the claimant did not sustain a compensable occupational disease injury; (2) the date of the alleged injury was _____; (3) the carrier is relieved from liability under Section 409.002 because the claimant failed, without good cause, to timely notify her employer of the claimed injury pursuant to Section 409.001; (4) the claimant did not have disability; and (5) the carrier did not specifically contest compensability of the claimed injury on the basis of sole cause. The claimant appealed and the Appeals Panel affirmed the hearing officer's decision. Texas Workers' Compensation Commission Appeal No. 983003, decided February 5, 1999. The claimant did not request an issue of carrier waiver at any time during these proceedings, nor did the claimant argue carrier waiver as a basis for compensability. The claimant has since sought judicial review and the case is currently pending in district court. The claimant now brings the issue of carrier waiver and represents that the proceedings in the district court have been abated pending our decision.

As stated above, the claimant contends that she did not waive the right to bring forward an issue of carrier waiver because Downs had not been finally adjudicated at the time of the prior CCH and the Commission retains jurisdiction over this issue

because the prior proceeding is under judicial review and has not become final. We cannot agree that an argument or defense based on statutory construction must await the decision of an appeals court in order to be timely raised and preserved. We would point out that the claimant in the Downs case was able to timely raise this matter, notwithstanding the lack of a court case decision. Additionally, the existence of the appeal in Downs to the Fourth Court of Appeals was public and known before the court issued its written decision. Because the claimant failed to raise the issue of carrier waiver in the prior proceeding, the issue was waived. Texas Workers Compensation Commission Appeal No. 002441, decided November 28, 2000. The previous determination on the issue of compensability is *res judicata*, and the Commission, in this proceeding, is without authority to effectively relitigate that issue based upon carrier waiver. Id.

The decision and order of the hearing officer is affirmed.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

**MR. JIM MALOY
AMERICAN INTERNATIONAL GROUP
8144 WALNUT HILL LANE, SUITE 1600
DALLAS, TEXAS 75231.**

Edward Vilano
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Michael B. McShane
Appeals Panel
Manager/Judge